sign for us all documents relating to, or in connection with, our business in Scotland, and specially we authorise you to sign, per procuration, for us and our behalf, all cheques, orders, and drafts, and to draw, grant, accept, or endorse for us and on our behalf all bills, promissory notes, and negotiable documents, and to discount the same on our credit and responsibility; and we engage to meet and honour all such cheques, orders, drafts, bills, promissory notes, and negotiable documents drawn, granted, accepted, or endorsed, or bearing to be drawn, granted, accepted, or endorsed by you, the said Samuel Watson Dempster, and to keep the parties dealing with you free and skaithless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the said Samuel Watson Dempster, in respect of all such cheques, orders, drafts, bills, promissory notes, and negotiable documents;' Find that between the said months of January and June 1870, inclusive, Dempster operated upon the said accounts, and discounted a number of bills in the pursuers' said branch, which discounts the pursuers allowed on the credit of the defenders, and relying on the said letter and procuration; find that, *inter alia*, Dempster so discounted the following bills, purporting to be drawn by the defenders upon, and to be accepted by, the parties following, viz.:—(1) for £96, 14s. 7d., by Brigham & Bickerton, machine makers, Berwick, dated 28th March 1870, payable four months after date; (2) for £100, by Howie & Young, engineers, Kirkcaldy, dated 19th April 1870, payable four months after date; (3) for £41, by Nevin & Rintoul, coach builders, Greenock, dated 27th April 1870, payable three months after date; (4) for £44, 10s. 9d., by Robert Russell & Sons, engineers, Carluke, dated 2d May 1870, payable four months after date; (5) for £276, 10s. 9d., by Caird & Company, shipbuilders, Greenock, dated 16th May 1870, and payable four months after date; (6) for £39, 5s. 6d., by James Hatley & Company, contractors, Carstairs, dated 23d May 1870, payable three months after date; (7) for £138, 14s. 9d., by Laing & Melvin, coach builders, Aberdeen, dated 1st June 1870, and payable four months after date; find that Dempster signed the said seven bills as drawer and endorser 'pp.' (that is per procuration of) Wm. Makin & Sons, except the one secondly above described, which was signed 'for Wm. Makin & Sons, D. M'Pherson,' as drawer, and was endorsed by Dempster as above; find that the signatures, purporting to be those of the acceptors of all the said seven bills, are forged, and that the defenders did not, at the dates thereof, have any claim against any of these parties; Find that the pursuers paid to Dempster the proceeds of all the said bills (deducting bank charges), and that the whole or part of the proceeds of the first six were paid into the said current account, and mixed up with the defenders' other monies therein; find that the proceeds of the seventh bill (deducting charges) having been £137, 2s. 2d., Dempster drew a cheque at the pursuers' said branch, and purchased therewith, and with £20 drawn from the current account, a draft on Messrs Glyn & Company, bankers, London, for £150 sterling, in favour of the defenders, the balance (£6, 19s. 1d.), after deduction of bank charges, having been paid to him in cash; Find that the said draft for £150 was not transmitted to the defenders, and they did not receive any part of the proceeds thereof; find that, of the parties appearing as acceptors of the said bills,—Messrs Brigham & Bickerton, Howie & Young, Niven & Rintoul, and Caird & Co., were existing firms, and the three first-mentioned had had business dealings with the defenders, but Messrs Robert Russell & Sons and Messrs James Hatley & Company were non-existent and fictitious; find that all of the said pretended acceptors appeared to be in lines of business in which dealings with the defenders might have taken place, that Dempster, when applying for discounts of said bills gave explanations which satisfied the pursuers' officers that they were genuine and *bona fide* bills, duly accepted by parties indebted to the defenders, in the ordinary way of their business, and that the pursuers discounted all the said bills, relying on Dempster's explanations, and on the apparent genuineness of the documents; Find it not proved that the pursuers failed to exercise due caution in discounting any of the said bills, or that the signatures thereto were manifest forgeries, or presented a suspicious appearance, which should have put the pursuers on their guard; therefore refuse the appeal, and decern; Find the appellants liable in expenses; Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor of Court to tax and report, and decern."

Counsel for Makin & Sons—Watson and Balfour. Agents—J. & R. D. Ross, W.S.

Counsel for Union Bank — Solicitor-General (Clark) and Marshall. Agents—J. & F. Anderson, W.S.

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CLYDESDALE BANK *v.* MAKIN & SON.

This was an action of precisely the same nature as that of the Union Bank, against the same defenders, and it was arranged by Counsel that the same argument should be held to apply to both cases, and that the same judgment should determine them.

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*Thursday, March* 6.

## FIRST DIVISION.

[Lord Ormidale, Ordinary.

### BATHIE *v.* WHARNCLIFFE.

*Lease—Constitution of Lease—Draft* — Rei interventus.

Circumstances *held* sufficient to instruct *rei interventus* to the effect of making an adjusted draft lease, although not extended or subscribed, binding upon the parties.

This action was brought by Margaret Bathie, tenant in the farm of Gateside of Newtyle, Forfarshire, against Lord Wharncliffe, her landlord, and

the summons concluded for declarator that the defender had leased the farm to the pursuer for a period of nineteen years, and also that defender should be ordained to execute a lease of the said farm in favour of the pursuer. The pursuer became tenant in the said farm upon the death of her father in 1854, and thereafter continued in possession. In 1868 the pursuer held communications with Mr Kerr, the defender's factor, with a view to obtain a lease for nineteen years from Martinmas 1868. Mr Kerr expressed willingness to make such an arrangement, and drafted a lease, which he sent to the pursuer, who, after having it revised by her agent Mr Bissett, returned it to Mr Kerr in order that it might be extended and executed. Mr Kerr retained the draft in his hands, and died without having it extended or executed. The pursuer, however, continued her tenancy of the said farm on the understanding that the agreement as to the nineteen years' lease was recognised by the defender and Mr Kerr, and on this understanding she laid out considerable sums of money upon the farm.

The defender admitted the pursuer's averments as to the draft of the lease, but alleged that no agreement for the lease was ever concluded. He averred that the draft had never been extended, or the contract completed, because the pursuer's agent had materially altered the terms of lease, and because the defender, when the matter was submitted to him, did not give his consent. The pursuer had therefore all along held the farm from year to year, and not upon a lease.

The Lord Ordinary allowed the parties a proof, the import of which is clearly shown by the Lord Ordinary's Note, and the opinion of the Lord President.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 27th December* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it proved that the farm of Gateside, and the other subjects libelled, have been let to the pursuer for the period, for the rents, and on the conditions, set out in the summons: Therefore Finds, Decerns, and Declares, in terms of the first conclusion of the summons; and under a reservation in the meantime of all questions of expenses, Appoints the case to be enrolled, in order to its being further proceeded with.

"*Note.*—The farm of Gateside, and the other subjects here in question, form part of Lord Wharncliffe's estate of Belmont, in Forfarshire, which had been for many years under the charge of the late Mr Christopher Kerr of Dundee, as his Lordship's factor and commissioner, until the death of that gentleman on the 1st of June 1869.

"The pursuer, Miss Margaret Bathie, was at Martinmas 1868, as she and her brother had been for the previous nineteen years, in possession as tenant of the farm of Gateside. Although there was no formal written tack, there is some evidence that Miss Bathie and her brother had got right from the landlord to the farm for a period of nineteen years. Miss Bathie says that this was her understanding, and in the rental account, kept for the landlord, 'for crop 1867, and other rents payable in 1868,' (Appendix of Documents, p. 20), there is an entry applicable to the farm of Gateside in these terms:—'*Conditions of Occupancy.*—Holds for nineteen years from Marts. 1849. Rent £83, payable at Candlemas and Lammas after reaping. And there is added—'*Note*—An arrangement is in progress for giving a new lease from Martinmas 1868.'

"That there were negotiations for a new lease in 1868, and that the draft (No. 69 of process) of such new lease was then prepared by Mr Christopher Kerr, or under his directions, for the landlord, and revised by Mr Gray Bissett on behalf of the pursuer, are undoubted facts in the case. But the parties are at issue on the question whether that draft lease, although not extended and subscribed by the parties and formally completed, must not now be held, in the circumstances which have been established by the proof, to be valid and binding as a lease.

"As preliminary to an examination of the proof, the Lord Ordinary may remark that he cannot help thinking that the difficulties in the way of the parties, which gave rise to the present dispute, might not improbably have been obviated, or have never occurred, had it not been for the death, not only of Christopher Kerr himself in June 1869, but also of the death of his son, Mr C. W. Kerr, who, it will be found from the evidence, had a good deal to do with the adjustment of the new lease, on the 10th of October 1868. Not only so, but it also appears from a correspondence which took place in 1869 and 1870, after the death of Mr Christopher Kerr, between Mr Bissett, as acting for the pursuer, and Mr William Kerr and Mr Whitton, as acting for the landlord, that the draft lease itself had gone amissing, although it was ultimately found amongst Mr C. Kerr's papers. The Lord Ordinary may further remark, in reference to this correspondence, that the fairness and accuracy of Mr Bissett's representations of the nature and terms of the draft lease, made at a time when it was supposed to be lost, are calculated in his opinion to add weight to the testimony that gentleman has given as a witness in the present case.

"In considering the proof, the two material questions to be kept in view are, 1*st*, Has it been established that the parties had agreed that the pursuer was to have a tack or lease of the farm and subjects in dispute, in conformity with the draft No. 69 of process? And 2*d*, Has this draft, although imperfect and invalid in itself, been validated and made obligatory *rei interventu*, or the actings of the parties following upon it? And in dealing with these two questions it is proper to observe that they have arisen in a dispute between the pursuer as tenant and her landlord, directly, and not between the pursuer as tenant and a singular successor of her landlord.

"The pursuer herself gives evidence clearly to the effect that Mr Christopher Kerr had agreed in April 1868 that she should have a new lease for nineteen years, as from Martinmas 1868; that the draft lease (No. 69 of process) was accordingly thereafter sent to her from Mr Kerr's office, that it was agreeable to her, and that she gave it to her agent, Mr Bissett, to do for her what might be necessary to get it completed. Mr Bissett, again, is quite distinct in his testimony, to the effect that on the 24th of August 1868 he had a meeting with Mr C. Kerr, when the latter stated that 'the matter was all right,' that he had instructed his son, Mr Webster Kerr, 'to prepare a lease of the farm of Gateside, and he referred me to him;' that, having accordingly got the draft as prepared in Mr Kerr's office, he, after going over it with the pursuer, re-

vised and completed it by filling up various blanks, and that on the 27th of August he went over and adjusted it at a meeting with Mr Webster Kerr, who, it was then arranged, was to get it extended and sent to him, Mr Bissett, for execution by the pursuer. Mr Bissett further states that in consequence of some delay having occurred in obtaining the extended lease, he saw Mr Webster Kerr on the subject about the beginning of September, who then told him 'it was all right,' only that the draft had to go before his father as a mere matter of form. Mr Bissett having in about ten days thereafter called for Mr Christopher Kerr, was told by him that the lease would require to be gone over by Mr John Davidson 'to see that it was all right with regard to the rotation of cropping,' and that it would be well to fix the rent of William Robertson's holding,' but 'he assured me at the same time that everything was all right;' and Mr Bissett also says that having thereafter met Mr C. Kerr, and reminded him that he had never got the extended lease for signature 'he told me that he had it in his bag, and that he would give orders for its being sent me ere long.' 'He said he was very busy, but that he had given John Davidson instructions to carry out the improvements provided for by the tack;' and he also said—'Margaret Bathie need not trouble her head about it, that it was all right.' In addition to all this there is the corroborative evidence to a large extent of Mr Macfarline, formerly the managing clerk of Mr C. Kerr, now one of the defender's agents, a witness adduced for him, besides a large body of evidence, written as well as parole, presently to be noticed, which although it bears especially on the matter of *rei interventus*, is also pregnant with important matter, showing that the terms and conditions of a lease had been agreed to; and if a lease had been agreed to it must have been that contained in the draft, No. 69 of process, for there is no evidence of there having been any other.

"The Lord Ordinary, however, is quite aware that a lease for a term of years cannot be established by parole evidence, but that the verbal agreement must be proved by writing or oath of party; *Walker* v. *Flint*, Feb. 20, 1863, 1 Macph. 417, and *Emslie* v. *Duff and Husband*, June 2, 1863, 3 Macph. 854. The Lord Ordinary does not therefore rest his judgment in the present case on the parole evidence, except in so far as that evidence may be competent and necessary to identify and render intelligible the writings and the actings forming the *res interventus*, whereby these writings, although defective and invalid as a lease in themselves, were perfected and made obligatory; and that parole evidence may be admissible in a case such as the present, for other purposes besides proving the *res interventus*, is well illustrated by the case of *The Earl of Mansfield and Threshie* v. *Henderson*, June 5, 1856, 18 D. 989.

"The principal writing upon which the pursuer relies is the draft lease, No. 69 of process. This writing is quite complete as a draft lease. It contains not only all the essentials of such a contract—that is to say, a description of the subjects of the lease, the term of entry, the period of endurance, and the rent to be paid—but also all the usual and necessary details. It could not indeed well be otherwise, for the draft was prepared, in the first instance, by the defender, as the landlord, or by his agent, who held ample powers for that purpose; it was then considered and revised by the pursuer and her agent, and by the latter it was returned to the landlord's agents, in whose possession it thereafter remained until recovered and produced in the present process. Nor can it be doubted that in law such a draft, if acted upon, —that is to say, if followed by the requisite *rei interventus*,— must bind the parties. This principle has been given effect to in numerous cases, occurring in every variety of circumstances, as referred to in Mr Hunter's Treatise on Landlord and Tenant, vol. i, p. 415, and following pages. But here there are other writings besides the draft lease, of a very pregnant character, in support of the pursuer's allegations that an agreement for a lease had been come to. Thus, in the rental accounts kept by or for the landlord for the years 1868 and 1869 (Appendix of Documents, pp. 22 and 30), there occurs an entry to the effect that 'lease expired at Martinmas 1868; new lease in course of adjustment for nineteen years from Martinmas 1868.' And that the new lease must have been held by the landlord or his agents as ultimately adjusted, the Lord Ordinary thinks may be reasonably inferred from others of the writings which have been produced, and especially from entries in the account at bottom of p. 23, and the accounts at pp. 23, 25, 26, 27, and 28 of the Appendix of Documents.

"As to the *rei interventus*, or actings of the parties, it appears to the Lord Ordinary that the proof—and there is a great deal of it—leaves no room for doubt on the subject. That the improvements or meliorations stipulated for by the new lease were nearly all carried into effect in the course of the autumn and winter of 1868, is proved beyond all question. Not only do various witnesses speak to this, but the written evidence, consisting of receipts and other documents, supported as it is by the parole evidence, is quite conclusive on the point. And that the improvements and meliorations were carried into effect on the faith of the lease as drafted seems also abundantly clear. The Lord Ordinary thinks it impossible to read the evidence of the pursuer herself, supported as it is more or less by that of all the other witnesses, without being satisfied of this. It is proved that the improvements were authorised and paid for—except the carriages, which, in terms of the new lease were undertaken by the pursuer herself—by the defender, or those acting for and in charge of his interests. It is also proved that these operations were of a character and extent to render it improbable that they should have been thought of, or executed at all, unless a new lease of some permanence had been agreed upon. All this indeed is placed beyond any question by the written receipts, accounts, and other documents recovered from the parties who acted, and still continue to act, for the defender. Many of these writings bear express reference to a lease under and in virtue of which the operations to which they relate were performed."

"These are the grounds upon which the Lord Ordinary has proceeded in pronouncing the prefixed interlocutor. But the Lord Ordinary has gone no further for the present than to sustain the first conclusion of the summons, as it is possible some of the subordinate details of the lease may still require adjustment. This, however, can be no reason for holding that the essentials of a lease were not agreed upon in terms of the first conclusion of the summons. *Erskine* v. *Glendinning*, 7th March 1871, 9 Macph. 655.

The defender reclaimed.

It was argued for him that the parole evidence could only be admitted in order to prove the *rei interventus*, for the only evidence competent to prove the agreement was writ or oath. But as oath was impossible on account of the death of Mr Kerr, the person who was said to have agreed to the lease, the proof was restricted to writing. The only writing produced was the draft lease, which did not show any agreement, but only that at one time there was a proposal that this should be agreement.

It was also argued that even if the writing was held sufficient, no *rei interventus* had been instructed —*Walker* v. *Bain*, Feb. 20, 1863, 1 Macph. 417: *Macrorie* v. *M'Whirter*, Dec. 18, 1810, 16 F.C. 86; *Emslie* v. *Duff*, June 2, 1865, 3 Macph. 854.

It was argued for the pursuer that the draft was a writing which, if followed by *rei interventus*, must bind the parties. It was also argued that *rei interventus* was clearly proved.

At advising—

Lord President—The Lord Ordinary has given judgment in terms of the first conclusion of the summons, in which the pursuer seeks to have it declared that the defender let to her the farm of Gateside of Newtyle for a period of nineteen years. Now, the way in which this tack for nineteen years is said to be proved is by a draft adjusted between the parties. The constitution of the lease is said to have been by verbal agreement, but the proof of it is the draft, and the draft not being signed in any way is said to be validated by *rei interventus*. All such cases require careful consideration, and it is essential not only that the writing should be distinct and clear, and be the writing of the party against whom it is used, but also that the *rei interventus* should relate to the alleged contract. The draft is shown in all essentials to have been adjusted. There may have been some details in which slight changes might have been afterwards made, but that is not material if in the draft we find all the essentials of a contract, and that it has been adjusted between the parties and followed by *rei interventus*. So let us see what is the position of this draft—In the first place, there can be no doubt as to the term of endurance; and, in the second place, as to the rent, although there seems to have been some slight misunderstanding on the subject of the rent for additional land, it is not contended that the rent for Gateside was not completely stated. In the third place, the subject of contract is definitely ascertained. There is, indeed, a difficulty as to the piece of land adjoining Gateside, occupied by Robertson, and when he gave up this it was in contemplation to add it to Miss Bathie's farm, and in the draft it was said that this should be done, provided an agreement could be come to between her and the proprietor. Accordingly in the original draft there was no lease of Robertson's farm—it was merely a prospective arrangement. A proposal was made by Miss Bathie's agent that the terms of lease of Robertson's farm should be inserted in the lease of Gateside, and a question is now raised, whether that matter was or was not finally adjusted. It is a matter of very little consequence. If not adjusted then, it was left for future arrangement, and whatever is found to be the proper reading will be given effect to, but meantime, whether any arrangement on that matter was made or not it does not interfere with the question as to Gateside. I think, therefore, that, looking to the whole evidence as to the draft, we have good written evidence of an agreement.

The only remaining question is as to the *rei interventus*. There are several things specially provided for in the lease as to buildings and drains. If the tenant Miss Bathie takes down certain ruinous cottages near to her steading, it is provided that the landlord is to build a dyke with the materials along the side of the road, and the tenant is then to take over the whole buildings of the farm as sufficient, and maintain them for the period of the nineteen years' lease. Miss Bathie did take down the cottages, and the landlord did build the dyke along the road, and, in consequence, Miss Bathie stands bound to maintain the whole houses and fences on the farm during her lease. This appears to me to be an act of *rei interventus* of great importance. She could have had no interest in pulling down the cottages, except under the lease. She performed her part, and though the landlord's act following thereon is not of itself *rei interventus*, yet his following up her act makes it clear that he saw and recognised what had been done by his tenant in terms of her lease. Besides, as the consequences to Miss Bathie were serious, binding her to keep up the buildings and fences for nineteen years, there is no possibility of ascribing her conduct to any other motive.

Again, there is an obligation on the landlord to drain the lands occupied by Simpson, but coupled with this is an obligation on the tenant to drive the materials for so doing. What follows? The landlord drains the land and the tenant drives the tiles. Is it conceivable that she would have driven tiles to be buried in land of which she was not to have possession, or that she did it except under the obligation imposed by the lease? But, finally, there is the importation of manure and lime, which is probably the most serious act of all, involving, as it did, an expenditure of nearly £50 by a tenant whose whole rent was only about £80. It is not common to import manure at all in a small farm; and it seems to me the wildest of propositions to argue that a tenant who held her farm on the precarious tenure of a year-to-year holding would ever think of doing so. A more insane proceeding for a yearly tenant it would be hard to imagine. It can be ascribed only to the lease for nineteen years which she had got; these acts are such as no one would perform except on the strength of a lease for a term of years. The dung would remain unexhausted for four or five years; the lime would remain so for certainly ten years, and, as some people think, perhaps for the whole term of the nineteen years' lease. These facts are quite inconsistent with the notion that the tenant had not a lease.

I think also that the Lord Ordinary was right in confining himself for the present to the first conclusion of the summons. The next thing to be done is to have the draft extended and duly executed, and we shall remit to the Lord Ordinary to proceed with what is necessary.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Miller and Scott. Agents—Adam & Sang, W.S.

Counsel for Defender — Solicitor-General and Robertson. Agents—G. & J. Binny, W.S.